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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-

DOUGLAS E. MORIGEAU,
Petitioner,

v.

NOEL K. LARRIVEE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-

DOUGLAS E. MORIGEAU,
Petitioner,

v.

NOEL K. LARRIVEE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

The petitioner, Douglas E. Morigeau, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Montana issued October 12, 1979.

OPINIONS BELOW

The opinion of the Supreme Court of Montana is unreported and appears as Appendix A hereto. The order of the District Court of the Fourth Judicial District of the State of Montana, in and for the County of Missoula, is unreported and appears as Appendix B hereto.

JURISDICTION

The opinion of the Supreme Court of Montana was entered October 12, 1979, with a notation that Mr. Justice Shea would file a dissent at a later time. When

the dissenting opinion was not forthcoming, petitioner applied for an extension of time within which to file a petition for a writ of certiorari. Mr. Justice Rehnquist, in a December 28, 1979, order, extended petitioner's time to and including February 22, 1980.[1] This Court has jurisdiction under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Where a state's assumption of jurisdiction over Indians on a reservation depends on tribal consent, may a state court expand its jurisdiction to areas in which the tribe never gave consent by interpreting a limited tribal grant of consent more broadly than the tribe?

STATUTES INVOLVED

Federal

Act of August 15, 1953, Pub. L. 83-280, 67 Stat. 588, 18 U.S.C. § 1162, 28 U.S.C. § 1360 (Appendix C).

Title IV of the Indian Civil Rights Act of 1968, 82 Stat. 73, 25 U.S.C. §§ 1321 to 1326 (Appendix D).

State

Montana Rev. Codes Ann. §§ 83-801 to 83-806 (1947), recodified as Montana Code Ann. §§ 2-1-301 to 2-1-307 (1979) (Appendix E).

Tribal

Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, Tribal Ordinances 36-A (Revised) (Appendix F) and 40-A (Revised) (Appendix G).

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[1] Subsequently, on January 16, 1980, petitioner received a letter from Mr. Justice Shea stating that, in light of other pressing court business, he would not be filing a dissent in this case.

STATEMENT OF THE CASE

Background

The Confederated Salish and Kootenai Tribes of the Flathead Reservation (the "Tribes") are organized under a constitution and bylaws adopted pursuant to the Indian Reorganization Act of June 18, 1934, 48 Stat. 984, 25 U.S.C. §§ 461 *et. seq.* They govern a reservation encompassing 1,243,968 acres of land in the state of Montana.

By the Act of August 15, 1953, Pub. L. 83-280, 67 Stat. 588, 18 U.S.C. § 1162, 28 U.S.C. § 1360 ("Public Law 280") (App. C), Congress initially extended state criminal and civil jurisdiction over most Indian country in five states, and authorized the remaining states, including Montana, to assume jurisdiction by affirmative legislative action.

The Montana Legislature in 1963 implemented Public Law 280 by authorizing the governor by proclamation to assume such civil or criminal jurisdiction over the Tribes as the Tribal Council might request.[2] On June 30, 1964, the governor accepted Tribal Ordinance 40-A, dated May 16, 1964, as a limited grant of jurisdiction by the Tribes. Subsequently, on May 5, 1965, the Tribes repealed Ordinance 40-A and enacted Ordinance 40-A (Revised) (App. G). The governor accepted Tribal Ordinance 40-A (Revised) on October 8, 1965.

By Ordinance 40-A (Revised), the Tribes, subject to certain conditions and limitations designed to prevent the exercise by the state of jurisdiction in excess of the grant,[3] consented to the extension of state laws and jurisdiction over Indians within the Reservation

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[2] Mont. Rev. Codes Ann. §§ 83-801 to 83-806 (1947), recodified as Mont. Code Ann. §§ 2-1-301 to 2-1-307 (1979) (App. E.).

[3] *See* App. G at 35a-36a.

"to the extent such laws and jurisdiction relate to the subjects following:

"(a) Compulsory School Attendance

"(b) Public Welfare

"(c) Domestic Relations (except adoptions)

"(d) Mental Health, Insanity, Care of the Infirm, Aged and Afflicted

"(e) Juvenile Delinquency and Youth Rehabilitation

"(f) Adoption Proceedings (With consent of the Tribal Court)

"(g) Abandoned, Dependent, Neglected, Orphaned or Abused Children

"(h) *Operation of Motor Vehicles upon the Public Streets, Alleys, Roads and Highways*

"(i) All Criminal Laws of the State of Montana; and all Criminal Ordinances of Cities and Towns within the Flathead Indian Reservation." (App. G; emphasis added.)

In 1968, Congress amended Public Law 280 to require that any further extensions of jurisdiction by *any* state over Indians in Indian country be conditioned upon tribal consent,[4] thus placing all such extensions of jurisdiction on essentially the same basis as the State of Montana's assumption of jurisdiction over the Tribes.[5]

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[4] Title IV of the Indian Civil Rights Act of 1968, 82 Stat. 73, 25 U.S.C. §§ 1321, 1322 (App. D.).

[5] The 1968 Indian Civil Rights Act requires tribal consent to be expressed through a referendum of tribal members, 25 U.S.C. § 1326 (App. D.), while the 1963 Montana law sought the consent of the Tribes' "tribal council or other governing body." Mont. Code Ann. § 83-802 (App. E). For purposes of the issue here presented, however, the precise manner of giving tribal consent is not important.

Proceedings Below

Petitioner is an enrolled member of the Tribes. He was involved in an automobile accident with the respondent, a non-Indian, on February 22, 1978, at the intersection of Montana Highways 200 and 212 on the Flathead Reservation. Respondent filed suit for damages in state court. A default judgment was entered on April 20, 1978, after petitioner failed to respond to a summons and complaint which were served on him at his residence located on tribal trust land on the Reservation. Subsequent proceedings, including the state district court's refusals to set aside the default judgment and petitioner's appeal to the Supreme Court of Montana on grounds of lack of jurisdiction, are summarized in the Supreme Court of Montana's opinion. (App. A at 2a-6a.)

The Supreme Court of Montana's decision sustaining state court jurisdiction rests on the court's interpretation of clause 1(h) of Tribal Ordinance 40-A (Revised) (App. G at 35a) as constituting tribal consent to state jurisdiction over tort suits brought by non-Indians against tribal members arising from motor vehicle accidents on the Reservation. This interpretation directly contradicts the Tribes' interpretation that the consent to state jurisdicion in clause 1(h) was intended by the Tribes to relate only to certain specific state safety laws, not to common law tort actions.[6] The Montana Supreme Court, in reaching its conclusion, relied on its view of the intent of the Tribal Council at the time it enacted the ordinance.[7]

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[6] The Tribes conveyed their interpretation to the Supreme Court of Montana in an amicus brief filed with that court.

[7] Neither the Montana Supreme Court nor the district court, however, held any hearing to help it determine what this intent in fact was.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE SUPREME COURT OF MONTANA INFRINGES ON TRIBAL SOVEREIGNTY.

Absent full compliance with the requirements of the governing Acts of Congress,[8] states may not exercise any jurisdiction which infringes on tribal authority over reservation affairs, even where one of the parties involved is not an Indian.[9] This prohibition clearly applies to state jurisdiction over tort actions arising from reservation automobile accidents, especially where, as here,[10] tribal courts exercise such jurisdiction.[11]

Under Montana's implementation of Public Law 280, it could assume only such jurisdiction over Indians on the Flathead Reservation as the Tribes consented to. (App.

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[8] *See Kennerly* v. *District Court of Montana*, 400 U.S. 423 (1971).

[9] *Williams* v. *Lee*, 358 U.S. 217, 223 (1959). In a series of decisions by this Court, "[t]ribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting personal and property interests of both Indians and non-Indians." *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 65 (1978).

[10] The court below recognized the extensive exercise of jurisdiction of the Tribal Court. Since 1975, 460 non-Indian plaintiffs have brought tort and contract actions—including automobile accident claims—against Indian defendants in Tribal Court. App. A. at 15a-16a.

[11] Two recent state appellate court decisions have held that state courts lacked jurisdiction over a non-Indian's tort claim against an Indian arising out of a motor vehicle accident on a state highway within an Indian Reservation, even though the record did not indicate that tribal courts provided a forum. *Enriquez* v. *Superior Court*, 115 Ariz. 342, 565 P.2d 522 (Ct. App. 1977); *Schantz* v. *White Lightning*, 231 N.W. 2d 812 (N.D. 1975). *See also Schantz* v. *White Lightning*, 502 F.2d 67 (8th Cir. 1974); *Wauneka* v. *Campbell*, 22 Ariz. App. 287, 526 P.2d 1085 (Ct. App. 1974); *Sigana* v. *Bailey*, 282 Minn. 367, 164 N.W. 2d 886 (1969); *Smith* v. *Temple*, 82 S.D. 650, 152 N.W. 2d 547 (1967); *Valdez* v. *Johnson*, 68 N.M. 476, 362 P.2d 1004 (1961).

E.) Similarly, since 1968, *no* state has been allowed to expand its jurisdiction over Indians on reservations without the consent of the affected tribe. (App. D). The Supreme Court of Montana infringed on tribal sovereignty by interpreting a limited grant of consent more broadly than the tribal government which gave the consent. By doing so, it effectively eliminated the requirement, in this instance imposed by the Montana legislature, for the Tribes to consent to the state's assumption of jurisdiction.[12] Even more serious, the state court simply ignored the interpretation which the Tribes proffered as to the meaning of the tribal ordinance, *i.e.*, what the Tribal Council's intent had been when Ordinance 40-A (Revised) was enacted, and substituted its own judgment for that of the Tribes. For a state court to so contradict a tribal interpretation and make itself the final arbiter of the meaning of tribal legislation seems as flagrant a violation of tribal sovereignty as can be imagined. That function, in the case of a disagreement over tribal intent, cannot properly be undertaken by the states any more than states should contradict the federal courts' interpretations of federal laws, or of Congress' intent in enacting them.[13] If states are free to contradict tribes on questions of what the tribal legislatures intended, the

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[12] In *Washington* v. *Yakima Indian Nation*, 439 U.S. 463 (1979), this Court reiterated its adherence "to the principle that the procedural requirements of Pub. L. 280 must be strictly followed" (*id.* at 484), and specifically held "that any option State can condition the assumption of full jurisdiction on the consent of an affected tribe." *Id.* at 495.

[13] Although the Montana Supreme Court noted that "the sovereign state of Montana is entitled in the least to an equal say in the interpretation of an agreement to which its full consent was necessary" (App. A at 17a), it was the state legislature which, by accepting Ordinance 40-A (Revised), chose to make its jurisdiction dependent on the meaning of a tribal ordinance, enacted by the tribal legislature. It therefore should be bound by the tribal interpretation.

tribes would be carrying out their legislative functions, as sovereigns, merely at the pleasure of the states.[14]

Indeed, the Tribal Council in Ordinance 40-A (Revised) sought to protect the Tribes against precisely the type of infringement on tribal sovereignty as has occurred here. The Ordinance protected tribal jurisdiction through provisions limiting state jurisdiction only to that which was expressly granted[15] and voiding the entire grant if it was "held to extend a jurisdiction more extensive than that set forth herein." (App. G at 36a.) To allow to stand a state court decision which ignored the Tribes' interpretation of the scope of the ordinance would gut the effect of these carefully constructed savings clauses and allow the state to assume jurisdiction more extensive than the Tribes intended.

II. THE STATE COURT'S DECISION, IF LEFT TO STAND, WOULD LEAVE THE TRIBES VIRTUALLY DEFENSELESS AGAINST UNLIMITED STATE EXPANSIONS OF JURISDICTION.

The ruling of the Montana Supreme Court, if not reviewed and reversed by this Court, would allow the state courts to proceed further to transform a limited consent

[14] At the very least, state courts should be precluded from contradicting a tribe's *reasonable* interpretation of its own ordinance. Here, the tribal interpretation clearly is reasonable. (*See* pp. 11-14, *infra*.) This case therefore does not involve an attempt by a tribe to escape from jurisdiction it clearly granted, perhaps by adopting some excessively limited interpretation of its earlier grant. In this case, therefore, the state court should be allowed at most to inquire into the reasonableness of the Tribes' interpretation. If it finds it to be at all reasonable or supportable, it should not be permitted to inquire further, and should be bound by the tribal interpretation.

[15] Ordinance 40-A (Revised) provides: "All jurisdiction of the Confederated Tribes . . . and of the Federal Government . . . to the extent not expressly transferred by Subsection 1 hereof, remains in the Confederated Tribes and in the Federal Government respectively as if this ordinance had not been adopted." (App. G at 36a.)

to state jurisdiction into a virtual carte blance embracing many areas that the Tribes never intended be covered. If the state court unilaterally can contradict the Tribes' interpretation of Ordinance 40-A (Revised) and decide that the grant of jurisdiction over the "[o]peration of Motor Vehicles upon the Public Streets, Alleys, Roads and Highways" includes automobile tort actions, could it not also take jurisdiction over probate proceedings involving an Indian killed while operating a motor vehicle on a public highway? Similarly, could not the grant of jurisdiction, in clause (b) of Ordinance 40-A (Revised), over "Public Welfare" be construed to include not just public assistance programs, but a vast variety of matters involving promotion of public welfare? And while the accident in this case happened to be between an Indian and non-Indian, nothing in the ruling or reasoning of the Montana Supreme Court would preclude future expansions of jurisdiction where only Indians were involved.

The possibilities for abuse here are virtually unlimited,[16] and abuses surely would occur. Twice already this Court has issued *per curiam* rejections of decisions of the Supreme Court of Montana which had violated *Williams* v. *Lee*, 358 U.S. 217 (1959), by incorrectly construing legislation to expand state jurisdiction at the expense of tribal sovereignty. In *Kennerly* v. *District Court of Montana*, 400 U.S. 423 (1971), the Court summarily vacated and remanded a state decision on the grounds that it ignored the affirmative legislative action prerequisite to Public Law 280 jurisdiction. In *Fisher* v.

[16] The potential for abuse at the lower state court level is particularly great. In the instant case, for example, the state district court reasoned that it had jurisdiction over citizens of the State of Montana, and therefore also over Indian citizens, because "[t]he equality of our constitution, both state and federal, abhor any discrimination because of race or any showing of favoratism because of race." (App. B at 20a.) The Montana Supreme Court, while affirming the lower court, at least did not adopt the same oft-discredited reasoning.

District Court, 424 U.S. 382 (1976), this Court reversed another decision that incorrectly interpreted a federal statute to confer jurisdiction over Indian adoptions upon the Montana courts. *Id.* at 388-89. Even more important is *Fisher's* rejection of the state supreme court's holding that tribal consent to limited concurrent jurisdiction over certain adoptions constituted broad acquiescence to state court jurisdiction over all adoptions.

The fears expressed above would be equally justified with respect to further assumptions of jurisdiction by any state under Title IV of the Indian Civil Rights Act, 25 U.S.C. §§ 1321-26, under which, since 1968, all states have been allowed to expand jurisdiction over Indians only with tribal consent. If state courts are not bound by a tribe's interpretation of its own consent, any limited grant of jurisdiction by a tribe could be seized upon by a state and used to open the door to a much wider assumption of jurisdiction.

Moreover, the lower court's decision here, if left to stand, would force the Tribes repeatedly to turn to this Court for protection of their tribal sovereignty. As in *Kennerly* and *Fisher*, the Supreme Court of Montana again has sought improperly to expand state jurisdiction at the expense of tribal government. In *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 812-13, *rehearing denied*, 426 U.S. 912 (1976), this Court assured Indian tribes that, since final state court decisions affecting federally protected Indian water rights are reviewable by this Court, subjection to legal challenge in state court would not imperil such rights. Here, unless this Court now exercises its review function, the Tribes, and other tribes in many other states, having no other available remedy in the face of improper state court "interpretations" of tribal consents to jurisdiction,[17]

[17] Montana does not presently provide for a retrocession procedure under which it must return jurisdiction upon tribal request. *Cf.* Utah Code Ann. § 63-36-15 (1953).

will have to come before this Court time and time again for rulings on the meaning of specific tribal grants of jurisdiction.

III. THE DECISION WILL DISCOURAGE INDIAN TRIBES FROM INITIALLY CONSENTING TO LIMITED STATE JURISDICTION OR EXPANDING A PRIOR GRANT OF JURISDICTION.

In addition, if the state court's decision stands, Tribes throughout the United States will be dissuaded from consenting to limited state jurisdiction for fear that a limited grant of jurisdiction will be twisted by state courts and expanded to other areas, all under the guise of "interpreting" the tribal grant of consent. Nor will tribes wish to expand any limited jurisdiction previously given. Unless the Montana court is instructed to follow the Tribes' interpretation of its consent, the chilling effect of the threat of state expansion of jurisdiction will be pervasive. With tribal consent a prerequisite to all further extensions of state jurisdiction, such jurisdiction could be frozen at the present level, ending the limited consents which Congress sought to encourage by the 1968 amendment to Public Law 280.

IV. THE STATE COURT'S DECISION WAS BASED ON AN ERRONEOUS READING OF TRIBAL INTENT AND DISREGARDED FUNDAMENTAL CANONS OF CONSTRUCTION ESTABLISHED BY THIS COURT.

The "legislative history" of Ordinance 40-A (Revised) clearly demonstrates that the Tribes' consent to concurrent state highway jurisdiction related only to specific state safety laws previously incorporated into the Tribes' own official Code of Ordinances, Ordinance 36-A (Revised) (App. F), and did not extend to tort suits arising out of automobile accidents on the Reservation.

In 1959, after state representatives disclaimed all responsibility for enforcing traffic violations by Indians on the Reservation, the Tribes enacted Ordinance 30-A (App. H), adopting as part of the Tribes' Official Code of Ordinances lengthy sections from the chapters of state law dealing with "Highway Patrol," "Obstructions," "Speed and Traffic Regulations," "Uniform Accident Reporting Act," and "Uniform Act Regulating Traffic and Highways." [18] The actual language of these sections was later incorporated into Ordinance 36-A (Revised) (App. F), under the chapter establishing the Code of Indian Tribal Offenses.

Subsequently, when the state enacted legislation allowing the Tribes to grant it whatever jurisdiction the Tribes consented to,[19] the Tribal Council continued to display a fundamental concern with highway safety,[20] while also expressing the desire to avoid the "great burden on the resources of our reservation if [the Tribes] had to foot the bill" for such problems as "compulsory school attendance, public assistance, domestic relations, mental illness, juvenile delinquency, dependent children, and *enforcement of the law on the highways.*" [21]

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[18] Significantly, Ordinance 30-A omitted any reference to state provisions relating to adequate security for damages from accidents and establishing liability of vehicle owners for damages inflicted by other drivers of their vehicles. *See* Mont. Code Ann. Ch. 6, Tit. 61 (1979), entitled "Responsibility of Vehicle Users and Owners" and comprised of sections on "Financial Responsibility," "Liability of Vehicle Owner," and "Mandatory Liability Protection."

[19] The ordinances passed prior to this could not unilaterally consent to state jurisdiction. *Kennerly* v. *District Court of Montana*, 400 U.S. 423 (1971).

[20] As indicated by the minutes of Council meetings in 1963, the Council members repeatedly discussed the need to enforce safety laws curbing "drunkenness," "recklessness," and speeding in connection with the possible extension of concurrent state jurisdiction over the "operation of motor vehicles upon the public streets, alleys, road and highways." Amicus Brief at 27-28, App. A-IX-10.

[21] *Id.* at 23-24, App. A-IX-1 to 4. (Emphasis added.)

Ultimately the Tribes, by Ordinance 40-A (Revised), agreed to grant the state concurrent civil jurisdiction in specific enumerated areas, as well as general criminal jurisdiction. (App. G.) Clause 1(h) of the Ordinance, in granting the state concurrent jurisdiction as to the "operation of motor vehicles" by Indians on the Reservation, was thus intended by the Tribal Council to refer to the specific sections of state law governing traffic law enforcement which already had been incorporated into tribal law as part of Ordinances 30-A and 36-A (Revised).[22]

Finally, to the extent the precise jurisdiction consented to in Ordinance 40-A (Revised) is ambiguous, the Montana decision also conflicts with the firmly established rule, dating back well over 100 years, that ambiguities in legislation, treaties and documents be construed in favor of retained tribal sovereignty.[23] Questions of the scope

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[22] *See* Amicus Brief, App. A-VI-1 to 28. The shorthand reference in clause 1(h) was necessary because the traffic laws referred to, as reprinted in Ordinance 36-A (Revised), run some 69 pages.

The actual language used in 40-A (Revised) came from the recent Public Law 280 mandatory jurisdiction statutes of the neighboring states of Washington and Idaho, covering virtually the same subject matter as Ordinance 40-A (Revised). *See* Wash. Rev. Code § 37.12.010 (1976) and Idaho Code § 67-5101 (1973). *See also Washington* v. *Yakima Indian Nation*, 439 U.S. 463 (1979). Because the language on motor vehicles used in the Washington and Idaho statutes is so similar to clause 1(h) of Ordinance 40-A (Revised), the ruling of the Montana Supreme Court would apply to those statutes as well, thus affecting thousands of Indians on the 17 reservations covering over 2.4 million acres in the three states. U.S. Department of Commerce, *Federal and State Indian Reservations* (1974).

[23] *E.g.*, *Worcester* v. *Georgia*, 6 Pet. 515, 580-82 (1832) (McClean, J., concurring); *The Kansas Indians* (*Wan-zop-e-ah* v. *Board of Comm'rs of the County of Miami*), 5 Wall. 737, 760 (1867); *Jones* v. *Meehan*, 175 U.S. 1, 11-12 (1899); *Cherokee Intermarriage Cases*, 203 U.S. 76, 94 (1906); *Choate* v. *Trapp*, 224 U.S. 665, 675 (1912); *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78, 89 (1918); *Carpenter* v. *Shaw*, 280 U.S. 363, 366-67 (1930); *United States* v.

of the exclusive jurisdiction of tribal courts go to the very heart of tribal sovereignty. Since the reference in Ordinance 40-A (Revised) to the "Operation of Motor Vehicles Upon the Public Streets" is hardly an unambiguous reference to tort suits, the Supreme Court of Montana should have interpreted the ambiguity in favor of the Indians. Its failure to do so, in light of the requirements established by this Court, was clearly in error.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. Alternatively, petitioner suggests that this Court summarily reverse the decision of the Supreme Court of Montana.

Respectfully submitted,

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Appendices

APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF MONTANA
1979

No. 14586

NOEL K. LARRIVEE,
Plaintiff and Respondent,

-vs-

DOUGLAS E. MORIGEAU,
Defendant and Appellant.

Appeal from: District Court of the Fourth Judicial District, Honorable E. Gardner Brownlee, Judge presiding.

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For Respondent:

Smith, Connor, Van Valkenburg and Larrivee, Missoula, Montana

Noel K. Larrivee argued, Missoula, Montana

For Amicus Curiae:

Victor F. Valgenti argued, Missoula, Montana
Evelyn M. Stevenson, Pablo, Montana

Submitted: April 27, 1979

Decided: Oct. 12, 1979

Filed: Oct. 12, 1979

/s/ Thomas J. Kearney
Clerk

Mr. Justice John C. Sheehy delivered the Opinion of the Court.

This is an appeal by Douglas E. Morigeau arising out of a default judgment taken against him in the District Court, Fourth Judicial District, Missoula County, for the sum of $9,417.70, exclusive of interest and costs.

The facts in the case indicate that Noel K. Larrivee was driving his automobile west on Montana Highway 200 toward its intersection with Montana Highway 212, in Sanders County on February 22, 1978. It further appears that Morigeau, traveling in an automobile in an easterly direction on Highway 200, attempted to turn left onto Highway 212 when his vehicle and that of Larrivee collided.

Larrivee filed his action against Morigeau in the Fourth Judicial District Court, Missoula County, on March 10, 1978. A summons was served upon the defendant personally in Sanders County, on March 15, 1978. On April 20, 1978, Larrivee requested the Clerk to enter default of the defendant Morigeau because Morigeau had failed to appear or answer the complaint. On the same date, the District Court entered default judgment against Morigeau for the amounts above set forth.

On May 1, 1978, Morigeau, through his counsel, filed several instruments in the District Court. One was a motion to set aside the entry of the default judgment upon the grounds of the defendant's mistake, inadvertence, and excusable neglect. The affidavit in support of the motion recites that Morigeau after service upon him, delivered his copy of the complaint to the Tribal Court of the Confederated Salish and Kootenai Tribes on March 20, 1978. Morigeau believed that the Tribal Court, or the tribal attorney, would take steps toward the handling of the complaint, a mistaken assumption. On April 13, 1978, the tribal attorney delivered the summons and

complaint to Morigeau's attorney, but she was not authorized by Morigeau to act on his behalf until April 19, 1978. There were some telephone conversations between Morigeau's attorney and Larrivee. Apparently there was an oral agreement between them that Larrivee would not take default judgment against Morigeau before April 19 or 20, 1978. Excusable neglect is alleged in that Morigeau's attorney was absent from the state during this period and he did not authorize her to act on his behalf until the afternoon of April 19, 1978. It is contended that the defendant's motions were mailed to Larrivee (though not filed in the court) on April 20, 1978.

The affidavit further recites that the place where the accident occurred is within the exterior boundaries of the Flathead Indian Reservation; that the defendant Morigeau is an enrolled member of the Confederated Salish and Kootenai Tribes of that reservation; that Morigeau, living within the exterior boundaries of the reservation, was not subject to service of state court process; and, that the subject matter of the controversy was not within the jurisdiction of the state District Court.

Also on May 1, 1978, Morigeau filed his motion to change venue and dismiss the action. The motion for change of venue was made upon the ground that the accident had occurred in Sanders County where the defendant had been served. The motion to dismiss the action contended that the District Court lacked subject matter jurisdiction because the defendant was an enrolled member of the Confederated Salish and Kootenai Tribes, living within the exterior boundaries of the Flathead Indian Reservation.

On May 11, 1978, oral argument was heard, evidence taken, and thereupon the District Court denied the motion to set aside the default judgment.

Defendant did not appeal from the order denying his motion to vacate the default judgment. Instead, on August 22, 1978, he filed a motion to vacate the default judgment and dismiss the same for lack of subject matter jurisdiction, again upon the grounds that the action was one between a non-Indian plaintiff and an Indian defendant over an accident which occurred within Indian country and was therefore subject only to the *exclusive* jurisdiction of the Tribal Court of the Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation.

The District Court refused to set aside the default judgment on October 10, 1978, saying in denying the motion:

> "Both parties are citizens of the State of Montana and each claim all the rights of such citizenship. The public highway was opened to public use and provides a further reason for holding that the State Courts have jurisdiction. The Federal Courts will not take the action holding that there is no diversity of citizenship, as there is not. The simple fact is that the defendant desires to be relieved of responsibilities of citizenship because of his race. The equality of our constitution, both state and federal, abhor any discrimination because of race or any showing of favortism [sic] because of race.
>
> "The defendant is a citizen of the State of Montana and subject to the jurisdiction of its courts."

Appeal from the order of the District Court of October 11, 1978, denying the motion to dismiss for lack of subject matter jurisdiction was taken by Morigeau on November 6, 1978. Confederated Salish and Kootenai Tribes of the Flathead Reservation have filed a brief in this matter as amicus curiae, contending that the state District Court does not have subject matter jurisdiction in this case.

From the recitation of the procedures followed in the District Court, as we have set forth above, it will be seen that no proper or timely appeal was taken from the order of the District Court denying the motion to set aside the default judgment on the grounds of excusable neglect, inadvertence or mistake; and no appeal was taken from the order of the District Court denying the motion for change of venue. Whether or not these motions have merit, since timely appeal was not taken from the denial of such motions, this Court is without jurisdiction to consider the issues covered by those motions on appeal. See Flathead Hay Cubing, Inc. v. Rex Moore (1978), 35 St.Rep. 1260 (Cause No. 14327, unpublished); Zell v. Zell (1977), —— Mont. ——, 565 P.2d 311, 34 St.Rep. 492; First Nat. Bank of Lewistown v. Fry (1978), —— Mont. ——, 575 P.2d 1325, 35 St.Rep. 276.

In his motion to set aside the default judgment, Morigeau did not precisely rely upon the lack of subject matter jurisdiction as a ground for setting aside that default, although reference to this is made in the affidavits supporting his motion as part of his contention that he had a meritorious defense. It appears from the record that the District Court ruled on the ground that there was no mistake, inadvertence or excusable neglect in denying that motion. We do not consider therefore that the question of subject matter jurisdiction was ruled upon by the District Court when it denied the motion to set aside the default judgment.

The appeal here taken is from the denial of the separate motion filed on August 22, 1978. An attack on subject matter jurisdiction may be raised at anytime. Since we find in this case that the question of subject matter jurisdiction was not precisely ruled upon by the court in its order denying the first motions, the appeal taken by Morigeau from the order denying the motion of August 22, 1978 to vacate and dismiss for lack of

subject matter jurisdiction is properly before us for consideration.

The single issue to be decided by us in this appeal therefore is whether the District Court had subject matter jurisdiction on which to sustain the default judgment.

In treading our way through the ever more complicated field of Indian relationships and responsibilities, we find and hold that the Confederated Salish and Kootenai Tribes ceded concurrent civil jurisdiction to the state District Courts of controversies arising out of the operation of motor vehicles within the exterior boundaries of the Flathead Reservation.

The federal Act of August 15, 1953 (Pub.L. 83-280, 83rd Cong., 2d Sess.), 67 Stat. 588, amended Publication 90-284, 82 Stat. 73, 78, 25 U.S.C. 1321, et seq. (1968), provided for the permissive extension of civil jurisdiction over Indians residing on Indian Reservations to the states where such reservations were located. In conformance with the federal Act of 1953, the Montana Legislature provided that the governor of Montana, upon receipt of a resolution from a tribal council or other governing body of the Confederated Salish and Kootenai Indians, expressing its desire as a people to be subject to criminal or civil jurisdiction in the State of Montana, should issue a proclamation to that effect. Ch. 81, Laws of Montana (1963).

We are not disposed in this case to get into an esoteric discussion of Indian rights and responsibilities vis-a-vis state jurisdiction. It is not necessary here because under an ordinance adopted by the Confederated Salish and Kootenai Tribes, and proclaimed by the governor of this state in accordance with Ch. 81, Laws of Montana (1963), the Confederated Salish and Kootenai Tribes consented to concurrent jurisdiction with state courts of

tort claims arising from highway accidents occurring within the exterior boundaries of the Flathead Reservation.

The pertinent provisions of Tribal Ordinance 40-A (Revised) adopted by the Tribal Council of the Confederated Salish and Kootenai Tribes, is as follows:

> "Be it enacted by the Tribal Council of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Dixon, Montana:
>
> "That Chapter 1, § 2 *Jurisdiction*, of the official code of ordinances be and the same is hereby amended to add subsections 1 and 2 of this ordinance following paragraph 3 to read as follows:
>
> " 'Subsection 1. Subject to the conditions and limitations expressed in Subsection 2 hereof, *the laws and jurisdiction of the State of Montana, including the judicial system of the State*, are hereby extended pursuant to, and subject to the conditions in, the Act of the Montana Legislature of February 27, 1963, Laws of Montana, 1963, Vol. 1, Chap. 81, P. 170, to Indians within the Flathead Reservation *to the extent such laws and jurisdiction relate to the subjects following*:
>
> " '(a) Compulsory School Attendance
>
> " '(b) Public Welfare
>
> " '(c) Domestic Relations (exception adoptions)
>
> " '(d) Medical Health, Insanity, Care of the Infirm, Aged and Afflicted
>
> " '(e) Juvenile Delinquency and Youth Rehabilitation
>
> " '(f) Adoption Proceedings (With consent of the Tribal Court)
>
> " '(g) Abandoned, Dependent, Neglected, Orphaned or Abused Children

"'(h) *Operation of Motor Vehicles upon the Public Streets, Alleys, Roads and Highways*

"'(i) All Criminal Laws of the State of Montana; and all Criminal Ordinances of Cities and Towns with the Flathead Indian Reservation.

"'Subsection 2. The effectiveness of Subsection 1 hereof is conditioned upon the following:

"(a) *Concurrent jurisdiction remains* (Where applicable with federal courts) with a Tribal Court and in the Tribal government of all matters referred to Subsection 1; and any matter initiated in either state or federal government court or the tribal court shall be completed and disposed of in that court and shall not be subject to re-examination in the courts of the other jurisdiction.

"(b) No person, once convicted of a crime falling within the jurisdiction of the state or federal government or the tribes pursuant to this ordinance, shall be punished for the identical acts of the courts of the other jurisdiction, but shall be accorded the doctrine of former jeopardy as if the separate jurisdiction were one.

"(c) This ordinance is subject to possible referendum of the eligible voters of the Confederated Tribes pursuant to Article 9 of the Constitution of Confederated Tribes . . .

"(d) All jurisdiction of the Confederated Tribes under the Constitutional bylaws and ordinances enacted pursuant thereto under the federal government of the United States Criminal Code, to the extent not expressly transferred by Subsection 1 hereof, remains the Confederated Tribes and in the federal government respective

to the same extent as if this ordinance had not been adopted.

"(e) If any provision of the act of the Montana Legislature of February 27, 1963 Laws of Montana 1963, Vol. 1, Chapter 81, or of this ordinance shall be held invalid, or if this ordinance be held to extend the jurisdiction more extensive than set forth herein, or any condition herein not be complied with or be held invalid or ineffective, then this entire ordinance shall be held to be void and of no effect from the beginning." (Emphasis added.)

The foregoing ordinance was adopted by the Tribal Council of the Confederated Salish and Kootenai Tribes on May 5, 1965. The governor of the State, the Honorable Tim Babcock, on October 8, 1965 proclaimed under the provisions of Ch. 81, Laws of Montana (1963), as follows:

"Now therefore, by the power vested in me, as the governor of the State of Montana, I, Tim Babcock, hereby proclaim *that criminal and civil jurisdiction in the State of Montana*, and its subdivisions does extend to the Confederated Salish and Kootenai Tribes as expressed in their approved Ordinance No. 40-A (revised) . . . and I further declare that 60 days from the date of October 8, 1965, such criminal and civil jurisdiction as previously described shall be in full force and effect." (Emphasis added.)

The Montana legislative action authorizing the governor to proclaim jurisdiction and the adoption of Tribal Ordinance 40-A (Revised) occurred under and while Section 7 of Pub.L. 83-280 was in effect. It should be noted that this section was repealed in Pub.L. 90-284 (1968), Title IV, Section 403(b). However the repealer expressly provided that the repeal did not affect any cession made prior to the repeal.

For any viewpoint of construction, Tribal Ordinance 40-A (Revised), as accepted and proclaimed by the governor of Montana, includes a broad grant of concurrent jurisdiction. The key language is that "[t]he laws and jurisdiction in the State of Montana, including the judicial system of the State" are extended to "(h) Operation of Motor Vehicles upon the Public Streets, Alleys, Roads, and Highways". Yet Morigeau contends, as does amicus, that this language is intended to grant only criminal jurisdiction over the operation of motor vehicles and not civil jurisdiction. Nothing can be found within the tribal ordinance consenting to state jurisdiction or the governor's proclamation assuming the same that limits or excludes state civil jurisdiction over the operation of motor vehicles on state highways.

Morigeau also contends, and again so does amicus, that subdivision (h) of the tribal ordinance is governed by subdivision (i) of the same ordinance, which consents to concurrent jurisdiction with the state as to all "criminal laws of the State of Montana". However, the legislative language of Tribal Ordinance 40-A (Revised), and its history does not comport with this argument.

Tribal Ordinance 40-A of the Confederated Salish and Kootenai Tribes was first passed on May 15, 1964. In the original version, subdivision (i) of subsection 1 read as follows:

> "(i) Laws of the State of Montana and ordinances and regulations of a criminal nature applicable within incorporated cities and towns."

Less than a year later on May 5, 1965, Tribal Ordinance 40-A (Revised) was passed by the Tribal Council amending subdivision (i) so that it reads as we have set it forth above in the first instance. It is obvious that the tribes, in examining Tribal Ordinance 40-A, as it was first adopted, decided that subdivision (i) was a broad

grant of concurrent jurisdiction to all the laws of the State of Montana, both civil and criminal. That particular subdivision was amended so that only criminal laws of the State of Montana were included in subdivision (i). At the same time, however, the language of subdivision (h) was left untouched. In other words, the broad consent to concurrent jurisdiction by the tribes as expressed in subdivision (h) remained and still remains.

It is also obvious from the history of the act that the whole subject of Tribal Ordinance 40-A, is a controversial one on the reservation. We noted its stormy progress in State ex rel. McDonald v. District Ct. of Fourth J. D. (1972), 159 Mont. 156, 496 P.2d 78, 80, where we said:

> "Tribal consent to the assumption of criminal jurisdiction by the state courts of Montana over Indians committing crimes on the Flathead Indian Reservation was granted by the enactment of Tribal Ordinance 40-A, dated May 16, 1964. The governor of Montana thereafter issued the required proclamation on June 30, 1964. Almost a year later on May 5, 1965 Tribal Ordinance 40-A (Revised) was enacted. This Ordinance was similar to the original Ordinance 40-A except for clarifying language limiting its scope to *criminal* laws and repealing the original Ordinance 40-A. The governor of Montana thereafter issued another proclamation accordingly dated October 8, 1965.
>
> "Several months later on June 22, 1966, Tribal Resolution 1973 was enacted expressly rescinding Tribal Ordinances 40-A and 40-A (Revised). There is no evidence that this Tribal Resolution was ever transmitted to or received by the governor of Montana; nor was any proclamation of the governor made in connection with this Resolution. On June 30, 1966

Tribal Resolution 1997 was enacted which expressly rescinded Tribal Resolution 1973 enacted eight days previously. Again no governor's proclamation was issued concerning Tribal Resolution 1997.

"On September 15, 1967 Tribal Resolution 2318 was enacted requesting the governor of Montana to extend the time limit for withdrawal from state jurisdiction for an additional year after October 7, 1967, and withdrawing its consent to such state jurisdiction. It further provided that this Tribal Resolution was null and void if the governor extended such time limit as requested. On October 8, 1967 the governor issued a third proclamation extending the time limit for the Tribe's withdrawal of their consent to state jurisdiction for an additional year from October 7, 1967.

"Finally, on April 30, 1971, the Tribal Council passed a motion 'to seek retrocession on State Concurrent Jurisdiction'. The record discloses no further action in conformity with this motion." 159 Mont. at 160, 161, 496 P.2d at 80.

One of the features of Ch. 81, Laws of Montana (1963), the legislative act which provided for the consent on the part of the State of Montana to extend jurisdiction to the Flathead Reservation is that statute provided that any consent by an Indian tribe could be withdrawn within two years of the date of the governor's proclamation. Such a withdrawal has not occurred.

Morigeau and amicus contend flatly that Tribal Ordinance 40-A (Revised) does not extend state jurisdiction in tort actions arising from the operation of motor vehicles on the highway. They argue (1) the Tribal Court has exclusive jurisdiction when a non-Indian sues an Indian on a reservation-based claim; (2) that the tribes agreed only to limited concurrent state civil jurisdiction

not including tort claims of the kind here in question; (3) tribal interpretation of Tribal Ordinance 40-A (Revised) is against concurrent jurisdiction; and (4) construction of Tribal Ordinance 40-A (Revised) to include civil jurisdiction in tort-highway cases would constitute an infringement upon tribal sovereignty.

In support of their arguments on the first contention, that the tribe has exclusive jurisdiction, Morigeau and amicus point out that this accident occurred in Indian country; that the highways exist by virtue of easements granted by the tribal authorities to the state and federal governments; that the Flathead Tribal Court is a forum for actions in tort available to non-Indians as well as to Indians, and that the Tribal Court has jurisdictional scope to include tort actions such as the one here. Those points, while significant in determining that the Tribal Court has jurisdiction, do not necessarily point to *exclusive* jurisdiction in the Tribal Court. None of the cases cited by Morigeau and amicus in support of those points hold or require that *only* the Tribal Court of the Flathead Indian Reservation, after the cession under Pub.L. 83-280, has exclusive jurisdiction of tort actions arising out of the use of the highways on the reservation. As a matter of fact, it appears that the Council of the Confederated Salish and Kootenai Tribes voluntarily found it in their interest to consent to such jurisdiction by the adoption of Tribal Ordinance 40-A (Revised).

Another consideration argued by Morigeau and amicus is that assumption of the State of civil jurisdiction in this case would constitute an infringement on the tribes of self-government. Again, this argument overlooks the point that the Confederated Salish and Kootenai Tribes *granted* and the State assumed civil and criminal jurisdiction to matters involving the use of the highways within the borders of the reservation. It is no more an infringement upon the tribal sovereignty to grant civil and criminal jurisdiction in highway cases than it is to

grant civil and criminal jurisdiction over cases of public welfare, domestic relations, juvenile delinquency, and care of the infirmed, aged and afflicted, all of which subjects involve tribal sovereignty and for all of which the tribe granted consent to civil as well as criminal jurisdiction in Tribal Ordinance 40-A (Revised).

As the tribal ordinance states, if the consent to civil and criminal jurisdiction is ineffectve as to one part, it is ineffective as to all parts of the tribal ordinance. It is too late now to pick and choose which parts of Tribal Ordinance 40-A (Revised) will be binding and which parts will not be binding. There are many economic, financial and social advantages accruing to the tribes by virtue of their consent. Those advantages have accompanying responsibilities which, to make the system workable, must also be faced and accepted.

What we have said in the foregoing paragraphs concerning the tribal claim of exclusive jurisdiction, touches and controls also the tribal claims that the tribes agreed only to limited concurrent state civil jurisdiction, not including tort claims of the kind here in question, and that construction of Tribal Ordinance 40-A (Revised) to include civil jurisdiction in tort-highway cases, constitutes an infringement upon tribal sovereignty. There remains for discussion the claim of Morigeau and amicus that tribal interpretation of Tribal Ordinance 40-A (Revised) is against state court jurisdiction.

In support of their contention, Morigeau and amicus point to our holding in Security State Bank v. Pierre (1973), 162 Mont. 298, 300, 511 P.2d 325, 327. There we said, quoting State ex rel. Iron Bear v. District Court (1973), 162 Mont. 335, 512 P.2d 1292:

> "Before a district court can assume jurisdiction in any matter submitted to it, it must find subject matter jurisdiction by determining: (1) whether the federal treaties and statutes applicable have preempted state jurisdiction; (2) whether the exercise of state jurisdiction would interfere with reservation self-government; and (3) whether the Tribal Court is currently exercising jurisdiction or has exercised jurisdiction in such a manner as to preempt state jurisdiction."

With respect to the first test stated in *Iron Bear*, the federal treaties and statutes have not in this case preempted state jurisdiction, because Pub.L. 83-280 provided particularly for the cession to and assumption by states of criminal and/or civil jurisdiction on Indian lands within the state's borders.

With respect to the second *Iron Bear* test, it is true that the assumption of either criminal or civil jurisdiction by the state of matters arising within the exterior boundaries of the Flathead Indian Reservation constitutes an interference with the powers of self-government conferred upon the tribes, see Fisher v. District Court (1976), 424 U.S. 382, 387, 96 S.Ct. 943, 47 L.Ed.2d 106. Again, Pub.L. 83-280 contemplated such interference when it provided for the assumption of criminal or civil jurisdiction by the states.

It is with respect to the third test under *Iron Bear* whether the Tribal Court has preempted jurisdiction, that Morigeau and amicus have concentrated their attack. Amicus has supplied us, through its briefs, with various certificates showing the establishment of a judicial system on the Flathead Reservation; the existence of a Tribal Court comprised of one Chief Judge, one full time associate, and two parttime associate judges; the Tribal Court has adjudicated claims arising from automobile accidents involving non-Indians versus Indian defendants relating to accidents occurring on the reservation; the Tribal Court keeps records, and that since 1975, 460 non-Indian plaintiffs have sued Indian defendants in civil

actions in the Tribal Court, involving tort and contract claims against Indian defendants; and various excerpts from the minutes of meetings of the Tribal Council relating to the progress through the legislature of House Bill 55, which became Ch. 81, Laws of Montana (1963). Yet, all of this material shows not that the Tribal Court is exercising *exclusive* jurisdiction, but rather is exercising *concurrent* jurisdiction in these matters, insofar as they are covered by Tribal Ordinance 40-A (Revised). The Tribal Ordinance itself specifically speaks of concurrent jurisdiction and it is important to note that Tribal Ordinance 40-A (Revised) includes the provisions that any action commenced and completed either in the Tribal Court or in the state on a matter is covered by the ordinance becomes res judicata as to the other court.

The record therefore does not support the application of the third test under *Iron Bear*, preemption by the Tribal Court, because when the Tribal Court acts with respect to causes covered by Tribal Ordinance 40-A (Revised), it is acting concurrently, and not exclusively.

Both Morigeau and amicus point to Kennerly v. District Court of Montana (1971), 400 U.S. 423, 91 S.Ct. 480, 27 L.Ed.2d 507, as controlling precedent for the present case. *Kennerly*, however, is not in point because the legislature there had not taken affirmative action as required under Pub.L. 83-280. Nor does our decision in Security State Bank v. Pierre, supra, control this case because in *Security State Bank*, the action was for the collection of a note entered into on the Flathead Reservation between an Indian member of the tribes residing on the Reservation and a nonmember bank. Such a commercial transaction is not one of the subjects over which the state assumes jurisdiction through Tribal Ordinance 40-A (Revised).

One other suggestion contained in Morigeau's reply brief should be discussed. Morigeau contends that this

case involves an interpretation of tribal law and that therefore, under principles of comity, this Court should abstain from a decision until the Tribal Court on the Flathead Reservation has interpreted the extent of civil jurisdiction ceded under subdivision (h) of Tribal Ordinance 40-A (Revised).

Abstention, Morigeau contends, would reduce "intergovernmental friction" likening the "competing interests" both of the state and the tribes to a "Pullman-type abstention situation" (Railroad Comm'n v. Pullman Co. (1941), 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed.2d 971). Morigeau also points out that in *Fisher*, 424 U.S. 382, 384, the United States Supreme Court noted that the Montana District Court had first referred the jurisdictional question to the Appellate Court of the Northern Cheyenne Tribe for decision.

Of course, in *Fisher*, supra, the dispute was completely between Indian members of the Northern Cheyenne Tribe. Moreover, the Appellate Court of the Northern Cheyenne Tribe, in *Fisher*, specifically did not decide whether the tribal court had jurisdiction of adoption by nonmembers of a member of a tribe. (See 424 U.S. at 384, n. 6).

We are not disposed to follow the federal system of abstention in this matter. First, such abstention would in this case simply leave the parties as they were at the close of the District Court proceedings. Morigeau is entitled to a final decision by this Court as to the validity of the judgment held by Larrivee against him. Secondly, the sovereign state of Montana is entitled in the least to an equal say in the interpretation of an agreement to which its full consent was necessary. It would be strange indeed if the state should agree to be bound by such interpretation of its consent as the other party chose to give it.

We therefore hold that the District Court had subject matter jurisdiction in this case through Tribal Ordinance 40-A (Revised); Ch. 81, Laws of Montana (1963), and Pub.L. 83-280, 67 Stat. 588 (1953).

This ruling is limited in effect, of course, to the Flathead Indian Reservation. This holding has no reference to the reasons cited by the District Court for upholding jurisdiction.

Affirmed.

/s/ John C. Sheehy
Justice

We Concur:

/s/ Frank I. Haswell
Chief Justice

/s/ Gene B. Daly

/s/ John Conway Harrison

Justices

Mr. Justice Daniel J. Shea will file his dissent at a later time.

APPENDIX B

IN THE DISTRICT COURT
OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF MONTANA
IN AND FOR THE COUNTY OF MISSOULA

No. 47644/14

[Filed Oct. 11, 1978]

NOEL K. LARRIVEE,
Plaintiff,

—VS—

DOUGLAS E. MORIGEAU,
Defendant.

ORDER

The essence of this action is a denial by the defendant of this courts jurisdiction to render judgment against him.

The defendant alleges he is a member of the Confederated Salish and Kootenai Tribes and that he resides on the Flathead Indian Reservation. He further alleges that the accident in question took place on a public highway built and maintained by the State and Federal government and lying within the boundaries of the Flathead Indian Reservation.

Both parties are citizens of the State of Montana and each claim all the rights of such citizenship. The public highway was opened to public use and provides a further reason for holding that the State Courts have jurisdic-

tion. The Federal Courts will not take the action holding that there is no diversity of citizenship, as there is not. The simple fact is that the defendant desires to be relieved of responsibilities of citizenship because of his race. The equality of our constitution, both state and federal, abhor any discrimination because of race or any showing of favortism because of race.

The defendant is a citizen of the State of Montana and subject to the jurisdiction of its courts.

The motion to vacate and dismiss is denied, the judgment stands.

Dated this 10th day of October, 1978.

/s/ E. Gardner Brownlee

STATE OF MONTANA)
) ss.
COUNTY OF MISSOULA)

I, LEA D. LaFRINIERE, Clerk of the District Court of the Fourth Judicial District of the State of Montana in and for the County of Missoula do hereby certify this [illegible].

WITNESS MY HAND and the Seal of this Court this 24th day of January, 1980.

LEA D. LAFRINIERE
Clerk

By /s/ Bonnie J. Henri
Deputy

APPENDIX C

PUBLIC LAW 280

(67 Stat. 588, 18 U.S.C. § 1162, 28 U.S.C. § 1360)

AN ACT

To confer jurisdiction on the States of California, Minnesota, Nebraska, Oregon, and Wisconsin, with respect to criminal offenses and civil causes of action committed or arising on Indian reservations within such States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That chapter 53 of title 18, United States Code, is hereby amended by inserting at the end of the chapter analysis preceding section 1151 of such title the following new item:

"1162. State jurisdiction over offenses committed by or against Indians in the Indian country."

SEC. 2. Title 18, United States Code, is hereby amended by inserting in chapter 53 thereof immediately after section 1161 a new section, to be designated as section 1162, as follows:

"§ 1162. State jurisdiction over offenses committed by or against Indians in the Indian country

"(a) Each of the States listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over offenses committed elsewhere within the State, and the criminal laws of such

State shall have the same force and effect within such Indian country as they have elsewhere within the State:

"State of	Indian country affected
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State, except the Menominee Reservation

"(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

"(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section."

SEC. 3. Chapter 85 of title 28, United States Code, is hereby amended by inserting at the end of the chapter analysis preceding section 1331 of such title the following new item:

"1360. State civil jurisdiction in actions to which Indians are parties."

SEC. 4. Title 28, United States Code, is hereby amended by inserting in chapter 85 thereof immediately

after section 1359 a new section, to be designated as section 1360, as follows:

"§ 1360. State civil jurisdiction in actions to which Indians are parties

"(a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:

"State of	Indian country affected
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State, except the Menominee Reservation

"(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

"(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section."

SEC. 5. Section 1 of the Act of October 5, 1949 (63 Stat. 705, ch. 604), is hereby repealed, but such repeal shall not affect any proceedings heretofore instituted under that section.

SEC. 6. Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: *Provided*, That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be.

SEC. 7. The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof.

Approved August 15, 1953.

APPENDIX D

Title IV of the Indian Civil Rights Act of 1968

(82 Stat. 73, 25 U.S.C. §§ 1321 to 1326)

AN ACT

To prescribe penalties for certain acts of violence or intimidation, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

* * * *

TITLE IV—JURISDICTION OVER CRIMINAL AND CIVIL ACTIONS

ASSUMPTION BY STATE

SEC. 401. (a) The consent of the United States is hereby given to any State not having jurisdiction over criminal offenses committed by or against Indians in the areas of Indian country situated within such State to assume, with the consent of the Indian tribe occupying the particular Indian country or part thereof which could be affected by such assumption, such measure of jurisdiction over any or all of such offenses committed within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over any such offense committed elsewhere within the State, and the criminal laws of such State shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction

against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof. (25 U.S.C. § 1321.)

ASSUMPTION BY STATE OF CIVIL JURISDICTION

SEC. 402. (a) The consent of the United States is hereby given to any State not having jurisdiction over civil causes of action between Indians or to which, Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe occupying the particular Indian country or part thereof which would be affected by such assumption, such measure of jurisdiction over any or all such civil causes of action arising within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute, or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may posses shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section. (25 U.S.C. § 1322.)

RETROCESSION OF JURISDICTION BY STATE

SEC. 403. (a) The United States is authorized to accept a retrocession by any State of all or any measure of the criminal or civil jurisdiction, or both, acquired by such State pursuant to the provisions of section 1162 of title 18 of the United States Code, section 1360 of title 28 of the United States Code, or section 7 of the Act of August 15, 1953 (67 Stat. 588), as it was in effect prior to its repeal by subsection (b) of this section.

(b) Section 7 of the Act of August 15, 1953 (67 Stat. 588), is hereby repealed, but such repeal shall not affect any cession of jurisdiction made pursuant to such section prior to its repeal. (25 U.S.C. § 1323.)

CONSENT TO AMEND STATE LAWS

SEC. 404. Notwithstanding the provisions of any enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil or criminal jurisdiction in accordance with the provisions of this title. The provisions of this title shall not become effective with respect to such assumption of jurisdiction by

any such State until the people thereof have appropriately amended their State constitution or statutes, as the case may be. (25 U.S.C. § 1324.)

ACTIONS NOT TO ABATE

SEC. 405. (a) No action or proceeding pending before any court or agency of the United States immediately prior to any cession of jurisdiction by the United States pursuant to this title shall abate by reason of that cession. For the purposes of any such action or proceeding, such cession shall take effect on the day following the date of final determination of such action or proceeding.

(b) No cession made by the United States under this title shall deprive any court of the United States of jurisdiction to hear, determine, render judgment, or impose sentence in any criminal action instituted against any person for any offense committed before the effective date of such cession, if the offense charged in such action was cognizable under any law of the United States at the time of the commission of such offense. For the purposes of any such criminal action, such cession shall take effect on the day following the date of final determination of such action. (25 U.S.C. § 1325.)

SPECIAL ELECTION

SEC. 406. State jurisdiction acquired pursuant to this title with respect to criminal offenses or civil causes of action, or with respect to both, shall be applicable in Indian country only where the enrolled Indians within the affected area of such Indian country accept such jurisdiction by a majority vote of the adult Indians voting at a special election held for that purpose. The Secretary of the Interior shall call such special election under such rules and regulations as he may prescribe, when requested to do so by the tribal council or other governing body, or by 20 per centum of such enrolled adults. (25 U.S.C. § 1326.)

APPENDIX E

(Mont. Rev. Code Ann. §§ 83-801 to 83-806 (1947), recodified as Mont. Code Ann. §§ 2-1-301 to 2-1-307 (1979))

CHAPTER 8

JURISDICTION OF INDIAN COUNTRY

Section 83-801. Criminal jurisdiction of Flathead Indian country to be assumed.

83-802. Resolution of Indian tribes requesting state jurisdiction — governor's proclamation — consent of county commissioners.

83-803. Date of assumption of jurisdiction — application of state law in Indian country.

83-804. Rights, privileges and immunities reserved to Indians.

83-805. Indian culture protected.

83-806. Withdrawal of consent to state jurisdiction.

83-801. Criminal jurisdiction of Flathead Indian country to be assumed. The state of Montana hereby obligates and binds itself to assume, as herein provided, criminal jurisdiction over Indians and Indian territory of the Flathead Indian reservation and country within the state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd Congress, 1st session).

83-802. Resolution of Indian tribes requesting state jurisdiction—governor's proclamation—consent of county commissioners. Whenever the governor of this state shall

receive from the tribal council or other governing body of the Confederated Salish and Kootenai Indian tribes, community, band or group of Indians in this state, a resolution, expressing its desire that its people and lands be subject to the criminal and/or civil jurisdiction of the state of Montana to the extent authorized by federal law and regulation, he shall issue within sixty (60) days a proclamation to the effect that such jurisdiction shall apply to those Indians and their territory, or reservation in accordance with the provisions of this act; provided, that he shall not issue such proclamation until such resolution has been approved in the manner provided for by the charter, constitution or other fundamental law of the tribe or tribes, if said document provides for such approval; provided further that he shall not issue such proclamation until there has been first obtained the consent of the board of county commissioners of each county which encompasses any portion of the reservation of such tribe or tribes.

83-803. Date of assumption of jurisdiction—application of state law in Indian country. Sixty (60) days from the date of issuance of the proclamation of the governor as provided for by section 83-802, the state of Montana shall assume jurisdiction over offenses committed by or against Indians in the lands prescribed in the proclamation to the same extent that this state has jurisdiction over offenses committed elsewhere within this state, and the criminal and/or civil laws of this state shall have the same force and effect within such lands as they have elsewhere within this state.

83-804. Rights, privileges and immunities reserved to Indians. Nothing in this act shall authorize the alienation, encumbrance or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band or community that is held in trust by the United States; or shall authorize regulation

of the use of such property in a manner inconsistent with any federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the state of Montana to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein; or shall deprive any Indian or any Indian tribe, band or community of any right, privilege or immunity afforded under federal treaty, agreement, statute, or executive order with respect to hunting, trapping, fishing or the control, licensing or regulation thereof.

83-805. Indian culture protected. Nothing in this act shall deprive, the Indian tribe, band or community from carrying on its age-old tribal dances, feasting or customary Indian celebrations or in any way try to destroy the Indian culture.

83-806. Withdrawal of consent to state jurisdiction. Any Indian tribe, community, band or group of Indians that may consent to come within the provisions of this act may, within two (2) years from the date of the governor's proclamation, withdraw their consent to be subject to the criminal and/or civil jurisdiction of the state of Montana, by appropriate resolution, and within sixty (60) days after receipt of such resolution the governor shall issue a proclamation to that effect.

APPENDIX F

ORDINANCE OF THE TRIBAL COUNCIL OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA

No. 36-A (Revised)

BE IT ENACTED BY THE TRIBAL COUNCIL OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES:

1. Chapter 1, 2, 3, 4, and 5 of the Official Code of Ordinances of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, as adopted pursuant to the authority vested in the Tribal Council of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, by paragraph (L), Section 1, Article 6 of the Constitution of said Tribes on October 27, 1937, is hereby repealed.

2. The following Law and Order provisions pertaining to the Official Codes of Ordinances, designated as Chapters 1 through 5 inclusive, is hereby adopted as the Official Code of Ordinances of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana:

LAW AND ORDER

Chapter 1

RESERVATION COURT

Section 1: Establishment of Court:

An Indian Court is established to be known as the Tribal Court of the Flathead Reservation, and the Council will by Ordinance define and establish a Law and Order Code for the maintenance of law and order and the administration of justice among the people of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana.

Section 2: Jurisdiction:

The Court shall have jurisdiction over enforcement of offenses against Tribal Council Ordinances which are promulgated under authority of Article 6, Section 1, Paragraph L, of the approved Constitution and by-laws of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, or the enforcement of any other ordinances which the Tribal Council may see fit to place under the jurisdiction of this court which they have heretofore at this time or at any future time, enacted under the provisions of their approved Constitution.

The lawful jurisdiction of the Flathead Tribal Court shall be concurrent and not exclusive with respect to any offenses over which Federal and State courts may have lawful jurisdiction.

It shall be the duty of the said Tribal Court of the Flathead Reservation to order delivery to the proper authorities of the State or Federal Government, or of any other Tribe or reservation for prosecution, any offender there to be dealt with according to law or regulations authorized by law where such authorities consent to exercise jurisdiction lawfully fixed in them over the said offender.

For the purpose of the enforcement of these regulations an Indian shall be deemed to be any person of Indian descent who is a member of the Confederated Salish and Kootenai Tribes or any person of Indian descent who is a member of any recognized Tribe under Federal Jurisdiction. The Flathead Reservation shall be taken to include all territory within the original reservation boundaries, including fee patented lands, roads, bridges, water, and lands used for Agency purposes, including townsites, incorporated towns and cities, as well as all alienated lands within the original boundaries of said reservation.

* * * *

APPENDIX G

CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA

Tribal Ordinance 40-A (REVISED)

ORDINANCE OF THE TRIBAL COUNCIL OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD INDIAN RESERVATION, AMENDING SECTIONS AND CHAPTERS OF THE "ORDINANCE OF THE TRIBAL COUNCIL OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA, NO. 36-A (Revised) ADOPTED MAY 23, 1962", HEREINAFTER REFERRED AS THE "OFFICIAL CODE OF ORDINANCES", AS FOLLOWS:

Be it enacted by the Tribal Council of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Dixon, Montana:

That Chapter 1, Section 2, Jurisdiction, of the Official Code of Ordinances be and the same is hereby amended to add subsections 1 and 2 of this ordinance following paragraph three to read as follows:

"Subsection 1: Subject to the conditions and limitations expressed in Subsection 2 hereof, the laws and jurisdiction of the State of Montana, including the judicial system of the State, are hereby extended pursuant to, and subject to the conditions in, the Act of the Montana Legislature of February 27, 1963, Laws of Montana, 1963, Vol. 1, Chap. 81, P. 170, to Indians within the Flathead Reservation to the extent such laws and jurisdiction relate to the subjects following:

(a) Compulsory School Attendance

(b) Public Welfare

(c) Domestic Relations (except adoptions)

(d) Mental Health, Insanity, Care of the Infirm, Aged and Afflicted

(e) Juvenile Delinquency and Youth Rehabilitation

(f) Adoption Proceedings (With consent of the Tribal Court)

(g) Abandoned, Dependent, Neglected, Orphaned or Abused Children

(h) Operation of Motor Vehicles upon the Public Streets, Alleys, Roads and Highways

(i) All Criminal Laws of the State of Montana; and all Criminal Ordinances of Cities and Towns within the Flathead Indian Reservation.

Subsection 2. The effectiveness of Subsection 1 hereof is conditioned upon the following:

(a) Concurrent jurisdiction remains (where applicable with Federal Courts) with the Tribal Court and in the Tribal Government of all matters referred to in Subsection 1; and any matter initiated in either a state or Federal Government Court or the Tribal Court shall be completed and disposed of in that Court, and shall not be subject to re-examination in the courts of the other jurisdiction.

(b) No person, once convicted of a crime falling within the jurisdiction of the State or Federal Government, or the Tribes pursuant to this ordinance, shall be punished for the identical act in the courts of the other jurisdiction, but shall be accorded the benefit of the doctrine of former jeopardy as if the separate jurisdictions were one.

(c) This ordinance is subject to possible referendum of the eligible voters of the Confederated Tribes pur-

suant to Article IX of the Constitution of the Confederated Tribes, and if a referendum is authorized and this ordinance disapproved by a majority under the conditions set forth in Article IX this ordinance shall be void and of no effect to transfer any jurisdiction to the State of Montana and its judicial system.

(d) All jurisdiction of the Confederated Tribes under their Constitution and Bylaws, and ordinances enacted pursuant thereto, and of the Federal Government under the United States Criminal Code, to the extent not expressly transferred by Subsection 1 hereof, remains in the Confederated Tribes and in the Federal Government respectively to the same extent as if this ordinance had not been adopted.

(e) If any provision of the Act of the Montana Legislature of February 27, 1963, Laws of Montana 1963, Vol. 1 Chap. 81, or of this ordinance shall be held invalid, or if this ordinance be held to extend a jurisdiction more extensive than set forth herein, or if any condition herein be not complied with or be held invalid or ineffective, then this entire ordinance shall be held to be void and of no effect from the beginning.

(f) In the event of any alleged violation of the Civil Rights of Tribal members by operation of this ordinance, the Tribal Council reserves the right to conduct an independent investigation of the alleged act; to seek redress in a court of competent jurisdiction; and to review the ordinance upon the validation of any such alleged offense.

Provided further that any sentences or convictions, lawfully inflicted under the provisions of this ordinance, shall not be affected by subsequent cancellation or voidance of this ordinance."

All ordinances and parts of ordinances in conflict herewith are hereby repealed (specifically Tribal Ordinance 40-A approved May 19, 1964).

CERTIFICATE

The foregoing ordinance was adopted by the Tribal Council of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana pursuant to the Act of the United States Congress of August 15, 1953; 67 Stat. 588, as amended (18 U.S. Code Section 1162; 28 U.S. Code Section 1360); the Act of the Legislature of Montana, February 27, 1963, Laws of Montana 1963, Vol. 1, Chap. 81, p. 170; and Article VI, Sec. 1, subsections (c), (n) and (q) of the Constitution of the Confederated Tribes, pursuant to Section 16 of the Indian Reorganization Act of June 18, 1934, 48 Stat. 984, the 5th day of May, 1965, by a vote of 7 for, 0 against, and 0 not voting.

/s/ Walter W. McDonald
WALTER W. MCDONALD
Chairman, Tribal Council

ATTEST:

/s/ Alvin E. Sloan
ALVIN E. SLOAN
Secretary

APPENDIX H

ORDINANCE
OF THE TRIBAL COUNCIL OF THE
CONFEDERATED SALISH AND KOOTENAI TRIBES
OF THE FLATHEAD RESERVATION, MONTANA

No. 30-A

BE IT ENACTED BY THE COUNCIL OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES:

1. To the extent the State of Montana and its political subdivisions may not have jurisdiction thereof, the use of all roads and highways within the Flathead Reservation by Indians, including members of the Confederated Salish and Kootenai Tribes, shall be subject to the laws and regulations of the State of Montana as hereinafter set forth. Such Sections of the Revised Codes of Montana, 1947, and amendments thereto, are hereby adopted as a part of the Official Code of Ordinances of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana. Minor changes in wording as may be necessary to make subject Sections applicable to the Official Code of Ordinances of the Confederated Tribes are approved.

2. The following Sections of the Revised Codes of Montana, 1947, and amendments thereto, are hereby incorporated as a part of the Official Code of Ordinances of the Confederated Salish and Kootenai Tribes of the Flatbed Reservation, Montana, with the same effect as if they were set forth word for word in their entirety:

Volume 3, Revised Codes of Montana, 1947, and amendments thereto, as follows:

Title 31, Chapter 1, "Highway Patrol", Sections 31-110, 31-118 through 31-138 inclusive, and 31-140 through 31-162 inclusive;

Title 32, Chapter 10, "Obstructions", Section 32-1014;

Title 32, Chapter 11, "Speed and Traffic Regulations", Sections 32-119, 32-1121 through 32-1131 inclusive, and 32-1143 through 32-1145 inclusive;

Title 32, Chapter 12, "Uniform Accident Reporting Act", Sections 32-1201 through 32-1213 inclusive; and

Title 32, Chapter 21, "Uniform Act Regulating Traffic on Highways", Sections 32-2101 through 32-21-165, inclusive.

3. All persons subject to the provisions of the Official Code of Ordinances of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, who operate motor vehicles on roads and highways within the Flathead Reservation must possess at all times a valid Montana Driver's License and all vehicles operated by such persons, both on and off the Reservation, must display a currently valid vehicle license plate as required and issued by the State of Montana.

4. The Chairman of the Tribal Business Council is hereby authorized to commission as Indian Service Highway Police such members of the Montana State Highway Patrol as may be required for the proper enforcement of the foregoing traffic laws and regulations.

5. A monthly report of all arrests, convictions, sentences, and such other data as may be required concerning violations of the Montana Motor Vehicle Code, will be forwarded by the Tribal Court to the Montana State Highway Patrol, Helena, Montana, through the Business Council.

6. It is the intent of this Ordinance to insure the proper regulation of the use of public highways within the exterior boundaries of the Flathead Indian Reserva-

tion by all persons, Indian and non-Indian. Concurrent jurisdiction over all offenses enumerated above when committed by any Indian within the exterior boundaries of the Flathead Reservation is hereby expressly vested, but not exclusively, in the various State courts of the State of Montana.

7. If this Ordinance shall be found invalid in any application, that shall not affect its validity in other applications or in other circumstances; but it shall remain in full force and effect to the maximum extent consistent with law.

CERTIFICATE

This Ordinance is adopted pursuant to Article VI, Section 1, paragraphs (L) and (E) of the Constitution of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, and subject to the jurisdiction accorded to the State of Montana by Section 2 of the Act of March 4, 1915, 38 Stat. 1188, 1189. Adopted by unanimous vote, by the Tribal Council of the Confederated Salish and Kootenai Tribes on June 29, 1959.

/s/ Walter W. McDonald
WALTER W. MCDONALD
Chairman
Tribal Council

/s/ Robert A. McCrea
ROBERT A. MCCREA
Secretary-Treasurer

APPROVED: June 30, 1959

/s/ Charles S. Spencer
CHARLES S. SPENCER
Superintendent
Flathead Indian Agency

[Illegible]

Supreme Court, U. S.
FILED
MAR 25 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1286

DOUGLAS E. MORIGEAU,
Petitioner,

v.

NOEL K. LARRIVEE,
Respondent.

RESPONDENT's BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

NOEL K. LARRIVEE
School of Law
University of Montana
Missoula, Montana 59801
(406) 243-5955

Respondent

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Respondent, NOEL K. LARRIVEE, respectfully submits the following brief in opposition to the Petition for Writ of Certiorari.

OPINIONS BELOW

The opinion of the Supreme Court of Montana is accurately stated in Appendix A of the Petition and is not restated herein. The Order of the District Court of the Fourth Judicial District of the State of Montana, in and for the County of Missoula, is accurately stated in Appendix B of the Petition and is not restated herein.

JURISDICTION

The Petition for Writ of Certiorari was timely filed and this Court has jurisdiction under 28 U.S.C. §1257 (3) (1976).

QUESTION PRESENTED

It is the Respondent's position that the question for review as presented in the Petition is misleading and would restate the question presented as follows:

Whether a state district court has jurisdiction over a claim for relief brought by a non-Indian against an Indian for an automobile accident occurring on a state highway within the exterior boundaries of the Flathead Indian Reservation where the tribe ceded concurrent jurisdiction to the state in such area of law.

STATUTES INVOLVED

The statutes cited in the Petition for Writ of Certiorari and appended thereto accurately reflect the relevant statutes for consideration of the issue here presented and are not restated.

STATEMENT OF THE CASE

The facts as stated in the "Background" portion of the Petition for Writ of Certiorari are fairly stated. However, a careful reading of the Montana Supreme Court's opinion (App. A at 6a-18a, Petition) reflects the court's position that the state district court had *concurrent* jurisdiction in the matter with the Tribal Court (App. A at 16a, Petition) as a result of the Tribes' ceding of jurisdiction to the state in specific areas (App. G at 35a, Petition). It was the conclusion of the Montana Supreme Court that:

> "Nothing can be found within the tribal ordinance consenting to state jurisdiction or the Governor's proclamation assuming the same that limits or excludes State civil jurisdiction over the operation of motor vehicles on state highways."

App. A at 10a, Petition.

It should be further noted that the scope of the Montana Supreme Court's opinion was restricted to the Flathead Indian Reservation (App. A. at 18a, Petition) as it is the

only reservation in the state to grant such jurisdiction pursuant to Public Law 280, 67 Stat. 588, 18 U.S.C. §1162, 67 Stat. 589, 28 U.S.C. §1360 (1976) (App. C, Petition).

ARGUMENT

I. THE OPINION OF THE SUPREME COURT OF MONTANA COMPLETELY REBUTS THE REASONS PLEADED BY PETITIONER FOR SEEKING REVIEW.

The Petitioner sets forth four arguments as a basis for this Court to grant a writ of certiorari (See Index, Petition). All the reasons stated by Petitioner for review are addressed in the state supreme court's opinion (App. A, Petition) and are considered separately as follows:

1. *The decision of the Montana Supreme Court does not infringe on tribal sovereignty.*

In a detailed dissertation (App. A at 6a-12a, Petition), the state supreme court traced the history of Public Law 280 (App. C, Petition), the ceding of concurrent jurisdiction by the Tribes in certain areas (App. G, Petition) and the assumption of such jurisdiction by the state (App. E, Petition). Here, the Petitioner is not questioning the validity of assumption of jurisdiction pursuant to Public Law 280,[1] but rather the scope of the consent by the Tribes to the state. This argument is misplaced. The opinion by the Montana Supreme Court correctly focuses on the issue of whether the state can exercise *concurrent* jurisdiction with the Tribal Courts in eight general areas of the law. The Montana Supreme Court carefully considered, and rejected, those cases the Petitioner cited in support of his contention that the state could not exercise concurrent jurisdiction under the facts presented, stating:

---

[1] *See Kennerly v. District Court of Montana,* 400 U.S. 423 (1979).

> "None of the cases cited by Morigeau and amicus in support of those points hold or require that *only* the tribal Court of the Flathead Indian Reservation, after the cession under Pub. L. 83-280, has exclusive jurisdiction of tort actions arising out of the use of the highways on the reservation. As a matter of fact, it appears that the Council of the Confederated Salish and Kootenai Tribes voluntarily found it in their interest to consent to such jurisdiction by the adoption of Tribal Ordinance 40-A (Revised)." (emphasis in original)

App. A at 13a, Petition. See also discussion App. A at 13a-14a, Petition.

The two principal cases cited by Petitioner in footnote 11 of the Petition [2] were presented to the state supreme court. Both of those cases are distinguishable from the instant case by one simple fact: Neither of the jurisdictions considering the question had assumed jurisdiction pursuant to a grant from the Tribes as reflected in Tribal Ordinance 40-A (Revised) (App. G, Petition). In each case cited in the footnote, the issue was whether the Tribal Courts had *exclusive* jurisdiction. Here, the question is whether the state district court could properly exercise *concurrent* jurisdiction. The Montana Supreme Court recognized the capacity of the Tribal Court to entertain actions by non-Indians against Indians, but concluded:

> "All of this material shows not that the Tribal Court is exercising *exclusive* jurisdiction, but rather is exercising *concurrent* jurisdiction in these matters insofar as they are covered by Tribal Ordinance 40-A (Revised). The Tribal Ordinance itself specifically speaks of concurrent jurisdiction and it is important to note that Tribal Ordinance 40-A (Revised) includes the provisions that any action commenced and completed either in the Tribal Court or in the state on a matter is

[2] *Enriquez v. Superior Court,* 115 Ariz. 342, 565 P.2d 522 (Ct. App. 1977), *Schantz v. White Lightning,* 231 N.W.2d 812 (N.D.1975).

> covered by the ordinance becomes res judicata as to the other court." (emphasis in original)

App. A at 16a, Petition.

2. *The state court's decision, if left to stand, will not "leave the tribes defenseless against unlimited state expansions of jurisdiction."*

The argument posed by counsel for Petitioner contending that the state will continue to expand its exercise of jurisdiction is pure speculation and conjecture. Counsel raises hypothetical questions that are not before this Court and are not subject to review.[3] The Petitioner suggests that the state supreme court has ignored or refused to recognize the right of tribal court jurisdiction in certain cases, which is obviously untrue.[4] There is nothing in the record to substantiate the Petitioner's allegations that the decision ". . . would leave the tribes virtually defenseless against unlimited state expansions of jurisdiction." (Petition at 8) Such rhetoric should not serve as grounds for granting certiorari.

3. *The decision will not discourage Indian tribes from consenting to state jurisdiction.*

Here, as in the preceding argument, counsel for Petitioner relies on unfounded speculation that tribes will be dissuaded from granting jurisdiction if the decision is allowed to stand. Petitioner ignores the fact that many benefits accrue to the tribes as a result of granting jurisdiction under Public Law 280, a fact recognized by the Montana Supreme Court:

> "There are many economic, financial and social advantages accruing to the tribes by virtue of their consent. Those advantages have accompanying responsi-

[3] *See e.g. Preiser v. Newkirk,* 422 U.S. 395, 403 (1975); *Aetna Life Ins. Co. v. Haworth,* 300 U.S. 227, 240-241 (1937.

[4] *See Security State Bank v. Pierre,* 162 Mont. 298, 305, 511 P. 2d 325, 329-30 (1973); *Blackwolf v. District Court,* 158 Mont. 523, 526-8, 498, P.2d 1293, 1294-5 K(1973); *Crow Tribe v. Deernose,* 158 Mont. 25, 28-30, 498 P.2d 1133, 1134-5 (1971).

bilities which, to make the system workable, must also be faced and accepted."

App. A at 14a, Petition.

Such benefits will continue to serve as an impetus to grant jurisdiction to the states as envisioned by Public Law 280.

4. *The state court's decision was based upon the plain meaning of the tribal ordinance.*

It is readily apparent from reading the first paragraph of the Statement of Facts in the Petition that this case involves an automobile accident occurring on a state highway within the exterior boundaries of the Flathead Indian Reservation. Petitioner has consistently recognized the fact that this case involves the "operation of motor vehicles upon the public . . . highways" as stated in Tribal Ordinance 40-A(h) (Revised). The language of the tribal ordinance is clear. It is also apparent that the drafters of the ordinance could discern the difference between civil and criminal jurisdiction and placed no limitation in the wording of that particular section of the ordinance dealing with operation of motor vehicles.[5]

Here, the effect of interpreting the ordinance as including tort actions is not to deprive the Tribal Court of jurisdiction in such cases,[6] but to simply recognize that the state courts have concurrent jurisdiction.

II. THE LIMITED SCOPE OF THE STATE SUPREME COURT'S RULING SHOULD PRECLUDE FEDERAL COURT REVIEW.

The issue in the present case in uniquely narrow, and no amount of strained semantics can convert it into one warranting review by this Court on certiorari.

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[5]*Cf.* Tribal Ordinance 36-A(Revised) and 40-A(Revised) (App. G and H, Petition). The fact that Ordinance 36-A(Revised) dealt with highway safety and regulation presupposes that 40-A(h) (Revised) was intended to cover something else.

[6]See Appendix to Amicus Brief at A-V-1.

Rule 19 of the U.S. Supreme Court Rules[7] succinctly sets forth the criteria that the Court will apply in determining whether to grant a writ of certiorari. The cases interpreting this rule state that certiorari is granted only in cases involving principles the settlement of which is of importance to the public as distinguished from the parties[8] and imply a reach to a problem beyond the academic or the episodic.[9]

Here, the ruling of the state court is limited to the Flathead Indian Reservation (App. A at 18a, Petition). It does not apply to any other reservation in Montana and does not preclude bringing a tort action in Tribal Court. The limited scope of the decision should discourage Federal Court review in this instance.

III. THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW.

This case does not turn on any interpretation of federal law. Petitioner does not argue that the provisions of Public Law 280 were not met or that provisions of the Indian Civil Rights Act (App. D, Petition), have been violated. Rather, the issue presented here is whether a single clause in a tribal ordinance grants concurrent jurisdiction in tort actions arising out of the operation of motor vehicles on a state highway on an Indian Reservation. This Court has consistently declined to review matters where substantial federal questions were not at issue.[10]

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[7]Rule 19 states in relevant part: "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are *special and important reasons therefor.* (emphasis supplied)

[8]*NLRB v. Pittsburgh Steamship Co.,* 340 U.S. 498, 502 (1951).

[9]*Rice v. Sioux City Memorial Park Cemetery, Inc.,* 349 U.S. 70, 79 (1955).

[10]*Herb v. Pitcairn,* 324 U.S. 117, 125-126 (1945); *Murdock v. City of Memphis,* 20 Wall. 590 (1875).

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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